Public Education:
Religious Rights and Values in Colorado Schools

Pacific Justice Institute

PROTECTING FAITH, FAMILY, AND FREEDOM

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An Open Letter to Parents, Teachers, Administrators and School Boards

We at the Pacific Justice Institute are dedicated to the protection of religious freedom, parental rights, and other civil liberties. Since the beginning of our organization in 1997, we have assisted thousands of parents, students, teachers, and school administrators with a wide range of issues involving civil rights in public education.

As someone concerned with the public school system, you may have questions about how the religious freedom rights of students relate to the so-called "separation of church and state." Or you may be interested in what rights parents have with respect to their child's education. This booklet will provide you with important information on critical issues confronting public education today. From Bible clubs to confidential medical releases, from prayer on campus to tolerance of students' political and religious beliefs in the classroom, we have designed this resource to clarify the important legal rights and responsibilities of parents, students, teachers, and school administrators in public education.

If you have any questions about the information presented in this booklet, or would like to receive legal assistance, please do not hesitate to contact the Pacific Justice Institute at (916) 857-6900.

Sincerely,

Brad Dacus, President

I

Students have a right to start Bible/Christian clubs on campus

We are aware that many school administrators fear that allowing a Christian club on campus violates the "separation of church and state." In contemporary society, there is a great deal of confusion about the meaning and legal authority of this phrase.

Contrary to popular belief, the U.S. Supreme Court has never insisted that there be an impenetrable wall between church and state.[1] Indeed, the Court has never thought it either possible or desirable to enforce a government regime of total separation in order to comply with the First Amendment's Establishment Clause.[2] Moreover, the "[wall of separation] metaphor . . . is not a wholly accurate description of the practical aspects of the relationship that in fact exists between church and state."[3]

As a matter of law, the Constitution "affirmatively mandates *accommodation*, not merely tolerance, of all religions, and forbids hostility toward any."[4] Therefore, limiting the existence or religious expression of a Christian

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[1] *Lemon v. Kurtzman*, 403 U.S. 602, 614 (1971).

[2] *Committee for Public Education & Religious Liberty v. Nyquist*, 413 U.S. 756, 760 (1973).

[3] *Lynch v. Donnelly*, 456 U.S. 668, 673 (1984).

[4] *Id*. (citations omitted) (emphasis added).

club based on a fear of violating "the separation of church and state" is clearly mislaid. Indeed, prohibiting Christian clubs when other types of clubs are allowed on campus is a violation of the separation of church and state.

Over thirty years ago, the U.S. Supreme Court decided *Tinker v. Des Moines School District.*[5] This case involved several students who were unconstitutionally suspended from school for wearing black armbands to class in protest of the war in Vietnam. "It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gates," the Court noted.[6] Moreover, "students may not be regarded as closed circuit recipients of only that which the . . . [government] chooses to communicate. They may not be confined to the expression of those sentiments that are officially approved. In the absence of a specific showing of constitutionally valid reasons to regulate their speech, students are entitled to freedom of expression of their views."[7]

Religious speech also falls within the scope of the *Tinker* case. The Supreme Court has affirmatively established that "private religious speech, far from being a First Amendment orphan, is as fully protected under the Free Speech Clause as secular private expression."[8] Privately expressed religious speech may not be constitutionally suppressed, or

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[5] Tinker v. Des Moines School District, 393 U.S. 506 (1969).

[6] *Id.* at 503.

[7] *Id*. at 511.

[8] *Capitol Square Review v. Pinette*, 515 U.S. 753, 760 (1995).

discriminated against, by any agent of the state on the sole reason that the speech or expression contains religious content.[9] Such discrimination necessarily amounts to an unconstitutional act of state sponsored hostility toward religion.[10] And although religious-based speech can often be controversial and cause uneasiness among some people who hear or see it, such effects are an inadequate basis for allowing a public school to prohibit student religious expression on campus during non-instructional hours.[11]

In addition to being constitutionally protected, the right of students to meet on campus during school non-instructional hours is protected by the Equal Access Act.[12] The Act generally provides, "It shall be unlawful for any public secondary school which receives Federal financial assistance and which has a limited open forum to deny equal access or a fair opportunity to, or discriminate against, any students who wish to conduct a meeting within that limited open forum on the basis of the religious . . . content of the speech at such meetings." If

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[9] *See, e.g., Good News Club v. Milford Central School*, 533 U.S. 98 (2001); *Lamb's Chapel v. Center Moriches Unions School Dist.*, 508 U.S. 384 (1993); *Widmar v. Vincent*, 454 U.S. 263 (1981).

[10] *See, generally, Lynch*, 465 U.S. 668 (1984).

[11] *See, e.g., Tinker, supra* n. 6 at 509 ["In order for the State in the person of school officials to justify prohibition of a particular expression or opinion, it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular point of view (underline added)."]; *See, also, Rivera v. East Otero School Dist. R-1,* 721 F. Supp. 1189 (D. Colo. 1989).

[12] 20 U.S.C. § 4071 (2004).

the school allows any non-curriculum groups to meet on campus, the Bible/Christian group must be afforded the same equal access as other non-curriculum groups.

Within the context of the federal Equal Access Act, the Supreme Court has defined “non curriculum student groups” as “any student group that does not directly relate to the body of courses offered by the school.”[13] More specifically, “a student group directly relates to a school's curriculum (1) if the subject matter of the group is actually taught, or will be taught, in a regularly offered course; (2) if the subject matter of the group concerns the body of courses as a whole; (3) if participation in the group is required for a particular course; or (4) if participation in the group results in academic credit.”[14]

Applying these criteria, the Court has summarily rejected the assertion that certain student groups like the Chess Club and National Honor Society were curriculum related, while the Christian Bible Club was not. Simply because particular student clubs might advance the “overall goal of developing effective citizens . . . enable students to develop lifelong recreational interests . . . [and] enhance students’ abilities to engage in critical thought processes,” does not, the Court held, make them sufficiently related to a school’s curriculum so that application of the Equal Access Act may be avoided.[15]

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[13] *Westside Community Board of Education v. Mergens*, 496 U.S. 226, 239-40 (1990).

[14] *Id*. at 239-40.

[15] *Id*. at 244; *See, also, Van Schoick v. Saddleback Valley Unified School District*, 87 Cal. App.4th 522, 529 (2001).

Additionally, based upon these criteria, student groups and clubs like Key Club, Honor Society, and Student Council are considered non-curriculum related.[16] If groups like these are allowed to meet on campus during school instructional hours, the school is under a legal obligation to afford the same, or similar, accommodations to a Bible/Christian club; such an accommodation cannot be legally denied. In sum, student Bible clubs and prayer groups must be given equal access.

II
Students can share their faith on campus

The Supreme Court has ruled that student speech is protected by the First Amendment as long as the speech is not
a material or substantial disruption.[17] This means that when students are outside of class they can share their faith with friends or other students. Student speech can

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[16] *See, e.g., Pope v. East Brunswick Board of Education*, 12 F.3d 1244, 1252 (3rd Cir. 1993)[the asserted historical/humanitarian subject matter of community service clubs, like the Key Club, is insufficient to make them curriculum related groups]; *Van Schoick, supra*, at 530 [school district requiring eight hours of community service for graduation does not make student community service groups like the Key Club or Girls League curriculum related.]
[17] *Tinker*, *supra* n. 6, 393 U.S. 503.

only be restricted when it substantially interferes with school discipline.[18] Interference, however, does not include some students finding the speech offensive; mere discomfort at the subject matter is not sufficient to restrict student speech.[19] Finally, speech in a limited public forum may only be subject to viewpoint-neutral limitations.[20]

A. Right to use evangelistic material when sharing faith

It is generally recognized that high school students can distribute religious materials containing Bible verses.[21] Students can also use religious tracts when they share their faith because tracts and other evangelistic materials constitute constitutionally protected speech.[22] As such, the First Amendment protects a student's right to distribute religious materials on campus.[23] Religious tracts

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[18] *Id.* at 508-509.

[19] *Id.* at 509.

[20] *Shero v. City of Grove, Okla.*, 510 F.3d 1196, 1203 (10th Cir. 2007).

[21] *Rivera v. East Otero School District R-1*, 721 F. Supp. 1189 (D. Colo. 1989).

[22] *Heffron v. International Society of Krishna Consciousness*, 452 U.S. 640 (1981); *Lovell v. City of Griffin*, 303 U.S. 444 (1938); *Cf. Widmar v. Vincent*, 454 U.S. 263, 269 (1981).

[23] *Rivera, supra* n. 21, 721 F. Supp. 1189; *Thompson v. Waynesboro Area School District*, 673 F. Supp. 1379 (M.D. Pa. 1987); *Nelson v. Moline School District No. 40*, 725 F. Supp. 965 (C.D. Ill. 1989); *Henry v. School Board of Colorado Springs School District 11*, 760 F. Supp. 856 (D. Colo. 1991). *See also Hedges v. Wauconda Community Unit School District No. 118*, 9 F.3d 1295 (7th Cir. 1993) (overturning discriminatory ban on student distribution of religious literature).

are considered pure speech, and "students are protected by the U.S. Constitution in the school environment. Prohibitions of pure speech can be supported only when they are necessary to protect the work of the schools or the rights of other students."[24]

In fact, a school cannot even require students to give advance notice when they plan to pass out religious tracts.[25] Schools also lack the power to restrict students to a certain area when passing out religious tracts, unless the students are disrupting school discipline.[26]

It should be noted that as a matter of law, Colorado prohibits school authorities from editing or censoring students' publication as long as such a publication is not obscene or is not promoting unlawful acts.[27]

B. Right to speak during non-instruction time about a religious topic

If a school allows any students to speak publicly on campus about non-curriculum issues, the school cannot prohibit students from speaking about religion because it

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[24] *Rivera, supra* n. 21, 721 F. Supp. 1189 (D. Colo. 1989).
[25] *Thomas v. Collins,* 322 U.S. 516, 540 (1945); *Burch v. Barker*, 861 F.2d 1149, 1157 (9th Cir. 1988).
[26] *Johnston-Loehmer v. O'Brien*, 859 F. Supp. 575 (M.D. Fla. 1994).
[27] C.R.S. § 22-1-120.

would be a violation of court precedent.[28] Because they are agencies of the government, public schools can only impose viewpoint-neutral limitations on students.[29] If a school allows any club to put on skits or lunchtime presentations, then the school must also allow students who want to put on religious skits or lunchtime presentations to do so as well.

III
Students can pray on campus

A student has the right to engage in personal prayer on a public school campus.[30] Contrary to popular belief, students are not even forbidden from engaging in *public prayer* at school. Moreover, students can gather and pray on school property before the school day officially

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[28] *See, e.g., Prince v. Jacoby*, 303 F.3d 1074, 1087 (9th Cir. 2002) ["While the school is certainly permitted to maintain order and discipline in the school hallways and classrooms by limiting the number and manner of both printed and oral announcements for all student groups, 20 U.S.C. §4071(f), it may not discriminate among students based on the religious content of [their] expression . . ."] and *Rosenberger v. Rectors and the Univ. of Virginia*, 515 U.S. 819, 828-829 (1995) ["It is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys . . . The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction."]

[29] *Shero v. City of Grove, Okla.*, 510 F.3d 1196, 1203 (10th Cir. 2007).

[30] *Chandler v. Siegelman*, 230 F.3d 1313, 1316 (11th Cir. 2000).

begins.[31] High school students can engage in voluntary group prayer, and elementary students can participate in group prayer with parental consent.[32] Thus, schools cannot deprive students of this right by refusing to allow student organized meetings.[33] "See You at the Pole" is an example of a student-led, student-initiated movement of prayer held annually on a national scale.

A. Personal prayer at public school

The right to engage in personal prayer in a public place is guaranteed by the Free Exercise Clause of the First Amendment. The Constitution does not "prohibit any public school students from voluntarily praying at any time before, during, or after the school day."[34]

In Colorado, voluntary exercise of religious profession and worship is forever guaranteed by the Colorado Bill of Rights.[35] Thus a student is free to bow his head and pray over his food at lunch, before a test, or during free time (such as study hall or recess).

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[31] *Herdahl v. Pontotoc County Sch. Dist.*, 933 F. Supp. 582, 589-590 (N.D. Miss. 1996).
[32] *Id.*
[33] *Daugherty v. Vanguard Charter Academy*, 116 F. Supp. 2d 897, 910 (W.D. Mich. 2000).
[34] *Santa Fe Independent Sch. Dist.*, 530 U.S. at 313 (2000).
[35] Colorado Constitution, Article 2: Bill of Rights, § 4: Religious Freedom.

B. Student-initiated group prayer at public school

The Constitution's recognition of personal prayer in school extends beyond silent prayer. Prayer that is spoken aloud or occurs in front of others is also protected by the First Amendment.[36] In order for a prayer to be considered private speech and therefore protected by the Constitution, it must be genuinely student-initiated and voluntary.[37] A prayer can be spoken aloud among a group of students as long as it does not "materially disrupt" the learning environment.[38] These private, vocal prayers can occur in the midst of an audience assembled for some other purpose.[39] For example, an individual student or a group of students can pray aloud during a school sporting event provided that the prayer does not materially disrupt the operation of the school.

In summary, vocal or silent prayer that is initiated by students and does not have the appearance of school endorsement is protected by the Constitution.

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[36] *Chandler*, *supra* 230 F.3d at 1317.

[37] *Id.*

[38] *Tinker, supra* n. 6., 393 U.S. at 509.

[39] *Chandler*, *supra* 230 F.3d at 1317.

IV
Students can take their Bibles to school

A. Taking a Bible to school for use during non-curricular times

In *Breen v Runkel,*[40] a federal court upheld the constitutionality of the activities of public school students who attended lunchtime Bible meetings. These Bible studies occurred during a non-curriculum part of the school day and did not disrupt the educational environment or infringe on the rights of fellow students. If students are allowed to attend such lunchtime Bible meetings, then they are allowed to take a Bible to school and read it during other non-curricular times of the day (recess, free time, etc.).

The First Amendment of the Constitution ensures the right to free speech, which includes the right of religious expression.[41] Moreover, the Supreme Court requires that school officials recognize students' constitutional rights in the school setting.[42] The school setting includes not only the classroom, but also the lunchroom, playing field, school yard, and hallways.[43] As a result, students are entitled to freely express their religious views by reading their Bible during the school day, insofar as a student's

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[40] *Breen v. Runkle,* 614 F Supp. 355 (W.D. Mich. 1985).

[41] *Widmar, supra* n. 9, 454 U.S. at 269.

[42] *Tinker, supra* n. 6, 393 U.S. at 506.

[43] *Id.* at 512-513.

decision to read the Bible in school is an expression of their religious freedom.

In order for a school to prohibit a student from reading the Bible during non-curriculum time, the school must show that the restriction was motivated by "something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint."[44] The school must show that the student's reading of the Bible "materially and substantially interferes" with the operation of the school or invades the rights of others.[45]

B. Taking a Bible to school for use during class time

If the student's personal Bible reading occurs during class or other curricular time, the government has some limited authority to restrict the activity. The reason for this is that classroom activities might reasonably be perceived to "bear the imprimatur [approval] of the school."[46] Thus, the school is able to exercise some discretion in order to avoid the appearance that it is endorsing a particular religion.[47]

Many schools have begun to implement a silent reading period at some point during the school day. During this

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[44] *Id.* at 509.
[45] *Id.*
[46] *Hazelwood School Dist. v. Kuhlmeier*, 484 U.S. 260, 271 (1988).
[47] *Roberts v. Madigan*, 921 F.2d 1047, 1057 (1990).

period, the teacher sets aside time for students to read a book of their choosing. Because it occurs in the classroom and is specifically designed to improve reading skills, schools may argue that the silent reading period is a curricular activity.

However, courts have yet to determine the exact classification of these silent reading periods. If they are found to be non-curricular time, students should absolutely be able to read their Bible as long as they do not "materially disrupt" the operation of the school. Even if these silent reading periods are classified as curricular, students may nonetheless be permitted to read their Bible if the school's silent reading policy allows students to read any *historical* or *educational* literature, or otherwise gives pupils discretion to read whatever they please. The school cannot restrict a student from reading the Bible while allowing all other literature.[48] Such viewpoint restrictions on reading material would be evidence of a clear hostility toward religion, which is forbidden.[49]

Discriminatory policies by schools which prevent students from reading the Bible would be an infringement on the student's religious expression. In order to justify even a content-based discrimination, the school must have a compelling state interest and the policy must be narrowly designed to achieve only that interest.[50] In the absence of such a compelling interest, the school cannot restrict a

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[48] *School District of Abington Township v. Schempp*, 374 U.S. 203, 225 (1963).
[49] *Zorach v. Clauson*, 343 U.S. 308, 314 (1952).
[50] *Widmar, supra* n. 9, 454 U.S. at 269-270.

student's personal Bible reading, even during a silent reading period.

In addition, school officials cannot entirely ban study of the Bible from public school curriculum. For example, the Bible can be part of a public school course as long as it is taught from a secular, educational point of view.[51] Courts have also held that the Bible has a legitimate place in public school libraries.[52]

V

Students can write papers and speak on Christian topics as class assignments

According to the U.S. Department of Education guidelines on religious expression in class assignments:

> Students may express their beliefs about religion in homework, artwork, and other written and oral assignments free from discrimination based on the religious content of their submissions. Such home and classroom work should be judged by ordinary academic standards of substance and relevance and against other legitimate pedagogical concerns identified by the school.

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[51] *Stone v. Graham*, 449 U.S. 39, 42 (1980)

[52] *Roberts v. Madigan*, 702 F. Supp. 1505, 1512 (D. Colo. 1989).

> Thus, if a teacher's assignment involves writing a poem, the work of a student who submits a poem in the form of a prayer (for example, a psalm) should be judged on the basis of academic standards (such as literary quality) and neither penalized nor rewarded on account of its religious content.[53]

Based on this standard, a student’s work should not be rejected merely because the student expresses a religious viewpoint in the assignment. Teachers cannot prohibit student expression in a discriminatory fashion.

VI
Schools facilities can be used for religious purposes outside of school hours

If a school allows any outside groups to use school grounds, then the school must also allow religious groups to use the campus. In a case that went before the Supreme Court, a religious group wanted to use school grounds for “a fun time of singing songs, hearing a Bible lesson and

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[53] *See* Guidance on Constitutionally Protected Prayer in Public Elementary and Secondary Schools. Found at www.ed.gov, this guidance has been jointly approved by the Office of the General Counsel in the Department of Education and the Office of Legal Counsel in the Department of Justice as reflecting the current state of the law. Dated February 7, 2003.

memorizing scripture, and religious worship."[54] Even though the Court felt the content was "quintessentially religious" and "decidedly religious in nature," it still held that the religious speech could not be excluded.[55] The school defended its policy by claiming that allowing a religious group on school grounds violated the Establishment Clause, but the Court held that "[T]he guarantee of neutrality is respected, not offended, when the Government, following neutral criteria and evenhanded policies, extends benefits to recipients whose ideologies and viewpoints, including religious ones, are broad and diverse."[56]

This school also contended that because they had elementary school children on campus, they had a higher duty to protect impressionable young children from a perceived government endorsement of religion. The Court rejected this argument, however, finding that the Establishment Clause does not prohibit "private religious conduct during nonschool hours merely because it takes place on school premises."[57] The Court also found that the danger of students misperceiving the religious event as one which the school sponsored was no greater threat than students perceiving religious hostility if the school did not allow the event.[58]

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[54] *Good News Club, supra* n. 9, 533 U.S. 98.

[55] *Id.*

[56] *Id.*

[57] *Id.*

[58] *Id.*

In another Supreme Court case, a private religious group wanted to use school grounds to present religious films.[59] The Court held that as long as the films were shown during non-school hours, were open to the public, and the event was not sponsored by the school, there was no danger that the district would be perceived as endorsing religion.[60] Courts have also held that literature advertising these types of religious programs can be distributed throughout the school.[61] If the school passes out fliers for secular activities then it cannot refuse to pass out similar fliers for religious events.[62]

In general, once a school opens up their grounds for use by outside groups, or passes out information about outside groups, the school then cannot refuse to do the same for religious organizations.

Finally, the court in *Am. Humanist Ass'n v. Douglas Cnty.Sch.Dist.*, citing *Bd. of Educ. v. Mergens*, 496 U.S. 226 (1990), stated that the "school cannot deny equal access to school facilities on the basis of the focus or viewpoint of the student group."[63] School officials may not mandate or organize religious ceremonies. But if a school makes its facilities and related services available to other private groups, it must make its facilities and

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[59] *Lamb's Chapel, supra* n. 9., 508 U.S. 384.
[60] *Id.*
[61] *Hills v. Scottsdale Unified Sch. Dist.*, 329 F.3d 1044 (9th Cir. 2003).
[62] *Id.*
[63] *Am. Humanist Ass'n v. Douglas Cnty. Sch. Dist. RE-1*, 158 F. Supp. 3d 1123 (D. Colo. 2016).

services available on the same terms to organizers of privately sponsored religious events such as baccalaureate ceremonies.

In addition, it is legal for students to pass out flyers about the religious event as long as advertising efforts do not disrupt class. Of course, elected officials and school employees are free to attend such services in their capacities as private citizens. In *Wigg v. Sioux Falls Sch. Dist.*, the court affirmed that a public school teacher was constitutionally entitled to participate in Christian club meetings after hours in the same school building in which she taught and with some of her students.[64]

VII

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[64] *Wigg v. Sioux Falls Sch. Dist. 49-5*, 382 F.3d 807 (8th Cir. 2004).

Schools can acknowledge/celebrate religious holidays such as Christmas and Easter

A. Celebrating a religious holiday in school and the classroom

Schools and teachers are often concerned that they will be impermissibly endorsing religion by sponsoring activities such as making Easter eggs, Hanukkah dreidels, displaying Christmas trees or performing Christmas musicals. In most cases, this concern is misplaced. It is constitutional for a public school to celebrate a religious holiday when there is a secular purpose to the celebration. For example, the use of calendars and seasonal displays recognizing a large variety of national, cultural, ethnic, and religious holidays has been upheld as serving the genuine secular purpose of broadening student understanding of, and respect for, various beliefs and customs.[65]

The fact that a particular religious holiday has become a significant secular tradition is also a permissible reason for celebrating that holiday. For example, a school Christmas musical production may include religious carols, so long as they are presented "in a prudent and objective manner and as a traditional part of the cultural and religious heritage of the particular holiday."[66] As a general matter, any Christmas musical program should also include secular

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[65] *Clever v. Cherry Hill Township Bd. of Educ.,* 838 F. Supp. 909 (D. N.J. 1993).
[66] *Florey v. Sioux Falls School Dist*., 619 F.2d 1311 (8th Cir. 1980).

Christmas carols such as “Rudolph the Red Nosed Reindeer” or “Jingle Bells.”

Many cases have dealt with the issue of whether religious holiday symbols displayed in a classroom or school are permissible. For the last three decades, the answer has been “it depends.” The classic example is the displaying of the Nativity Scene. Displaying the Nativity Scene with religious symbols from other religions or secular symbols is constitutional because doing so acknowledges secular aspects of the holiday. For example, placing the Nativity Scene alongside the Jewish menorah, Santa Claus, or a Christmas tree would be permissible because such a display sends the secular message of inclusion and the freedom of one to choose his or her own beliefs.[67]

Holidays are a large part of our nation’s culture and tradition, and provide students an opportunity to learn about the various beliefs of different religions and ethnicities. Teachers and administrators should not completely shun recognizing those holidays out of a fear of offending non-religious students or a perceived “separation of church and state” concern. Finally, school administrators should offer opportunities for students who do not wish to

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[67] *Sechler v. State College Area Sch. Dist.*, 121 F. Supp. 2d 439 (M.D. Penn. 2000) (rejecting Establishment Clause challenge to "Winter Holidays" school display of various religious and secular items, such as various books, a Menorah, a Kwanzaa candelabra, a snowflake, etc., found to convey inclusive message rather than favoring one religion over others or favoring religion over non-religion).

take part in holiday celebrations to opt-out of those activities.

VIII
School districts may determine confidential medical release policies

A. Colorado Statutes and Education Code

Based on current laws, school districts have an option regarding whether or not to require parental consent before releasing students for confidential medical treatment. No law explicitly requires schools to allow students to leave campus for medical treatment without parental notification; instead, state law gives individual school districts vast discretionary power in setting policies for their schools. According to C.R.S. § 22-1-123 (2), a "school district shall comply with the provisions of 20 U.S.C. 1232g(a) and 34 CFR 99 if a parent or legal guardian of a student either requests the education records of the student or requests an amendment or other change to the education records after reviewing them."[68]

In *People v. Bachofer*, the court held that school records may be released "only if the agency or institution makes a reasonable effort to notify the parent" so that "the parent or eligible student may seek protective action."

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[68] Colorado Revised Statutes Title 22. Education § 22-1-123 (Protection of student data—parental or legal guardian consent for surveys).

This ruling makes it clear that parental consent is required before releasing student information.[69]

Numerous court cases have long held that parents enjoy a well-established legal right to make important decisions for their children. Because of the serious health and safety concerns involved in medical treatments, this right is not suspended during school hours and supplanted by a child's right to privacy. To allow minors an absolute right to leave school premises during school hours for medical treatment without parental consent would create a situation in which minors have a unique window of opportunity—school hours—in which to pursue medical treatment with potentially serious medical consequences without the knowledge, consent or advice of their parents. The ultimate responsibility for the minor's health, safety, and welfare should rest with the parents in these situations.

B. Parental consent is required

The Colorado law refers to the federal FERPA law as to how a school district must handle parent or legal guardian requests for either student education records or amendments to the student school records after reviewing them.[70] Also, schools can't release educational records without the parent or guardian's written consent, except as permitted by FERPA.[71]

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[69] *People v. Bachofer*, 192 P.3d 454 (Colo. App. 2008).

[70] C.R.S. § 21-1-123: Protection of Student Data.

[71] Family Educational Rights and Privacy Act (FERPA) of 1974.

The Family Educational Rights and Privacy Act (FERPA)[72] is a federal law that affords parents the right to have access to their children's education records, the right to seek to have the records amended, and the right to have some control over the disclosure of personally identifiable information from the education. Parents or eligible students have the right to request that a school correct records which they believe to be inaccurate or misleading.

If a school district needs written consent from a parent or guardian to release personally identifiable student's records (other than directory information), they must provide the following specific information:

1. Records to be released;
2. Reasons for the release;
3. Person or organization requesting the information;
4. Manner in which the records will be released; and
5. Right to review or receive a copy of the records to be released

At the beginning of each school year, the parent or guardian of each student in a school district must be sent written notice of their rights under federal and Colorado law. [73]

The Protection of Pupil Rights Amendment (PPRA) protects the rights of parents and students by ensuring schools make instruction materials available to parents for

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[72] 20 U.S.C. § 1232g; 34 CFR Part 99.
[73] C.R.S. § 21-1-123: Protection of Student Data.

inspection, including surveys and evaluations their children will participate in, and ensures schools get written parental consent before students are required to participate in those surveys or evaluations.[74] This is also part of the Colorado law. Any student evaluation or assessment on the following topics can only be done with the written consent of the student's parent or guardian:

- Political or religious affiliations
- Mental conditions
- Sexual behaviors
- Illegal or self-incriminating behavior
- Critical appraisals of the student's close family
- Legally privileged relationships or the equivalent, such as with a lawyer, doctor, or clergy
- Income, except as required by law (such as for public benefits including free school lunch)
- Social Security Number

Written consent by a parent to a survey or evaluation of his or her student is only valid if the school district makes a copy of the survey document available for viewing at convenient places and times for at least two weeks after parents receive the written notice. This would include information on:

1. How the assessment will be disseminated;
2. What information will be obtained;
3. The purpose of the assessment;
4. Who will have access to the information; and

[74] 20 U.S.C. §1232h; 34 CFR Part 98.

5. How a parent or guardian can grant or deny permission to access the school records or survey their child for this purpose. [75]

IX
Parents have the right to participate in decisions relating to the education of their children

Colorado state legislators recognize that parents have primary responsibility for the upbringing of their children, and clearly give parents the right to participate in any and all "decisions relating to the education" of their children.[76]

However, many parents are unaware of the opportunities available to them to influence the direction and policies of their child's school. If fully utilized, parents have the power to achieve what lawsuits and courts cannot in determining the outcome of their child's public school education.

Colorado parents firstly need to realize that Colorado doesn't require sexual education in schools. Colorado is one of few states that doesn't require that students learn either about sexual education or HIV.[77] School districts can choose whether or not to teach sexual education, and the

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[75] 20 U.S.C. §1232h (c)(1)(A)(i).
[76] 2020 Parent's Bill of Rights HB 20-1144.
[77] C.R.S. § 22-1-128.

state does not track how many districts do or don't teach sexual education.

Colorado's local control laws also mean districts choose their curriculum if they do choose to teach sexual education. State law only sets some basic requirements, mainly that education should be comprehensive and medically accurate.[78]

Secondly, parents and guardians should understand their rights to opt-out. In Colorado, if districts are going to teach sexual education, they are required to first inform parents about what they will teach so that parents can choose to keep their children out of those classes. Parents can opt children out of entire sexual education courses, or they can get more information about the topics that will be covered and keep their children out of only some of those lessons.[79]

X
Parents can opt their children out of comprehensive sex education and HIV/AIDS prevention education

According to the current Colorado Comprehensive Human Sexuality Education Bill, "a school district, board

[78] C.R.S. § 22-1-128(1)(a)(XIII).

[79] C.R.S. § 22-1-128(3)(a).

of cooperative services, charter school, or institute charter school that offers a planned curriculum that includes comprehensive human sexuality education shall provide to the parent or guardian of each student" planned curriculum of the proposed education.[80]

The statute encourages parental involvement in sexual education of students and gives parents "ability to excuse a student, without penalty or additional assignment, from that portion of the planned curriculum that includes comprehensive human sexuality education."[81]

To preserve the right of parents to ensure the safe and supportive environment required by the Colorado Comprehensive Human Sexuality Education bill, parents have the specific right to opt their child out of comprehensive sex education classes, HIV/AIDS prevention education, and presentations made by guest speakers who discuss these topics and issues of sexual orientation.[82] Before making the decision to opt their child out of such classes and presentations, parents may examine the curriculum being used and meet with the instructor and principal to discuss the presentation of these topics to their child. [83]

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[80] C.R.S. § 22-1-128 (3).
[81] C.R.S. § 22-1-128 (6)(a).
[82] It is crucial to note that the bill actually encourages parents to take proactive roles in students' sexual education.
[83] C.R.S. § 22-1-128 (3).

XI
Prohibition on tests or surveys regarding personal beliefs or practices of students or their parents on religion, morality, sex and religion

Families have a general constitutional right to be left alone.[84] In that students are a captive audience in the schools, it is unconscionable for school authority figures to use their positions to probe into the private lives of students. Nor should highly sensitive information about a pupil's family be sought through questionnaires and surveys.

In view of this, the Education Code provides for specific protections to students and their families. "No test, questionnaire, survey, or examination containing any questions about the pupil's personal beliefs or practices in sex, family life, morality, and religion, or any questions about the pupil's parents' or guardians' beliefs and practices in sex, family life, morality, and religion, shall be administered to any pupil in kindergarten or grades 1 to 12, inclusive, unless the parent or guardian of the pupil is notified in writing that this test, questionnaire, survey, or examination is to be administered and the parent or guardian of the pupil gives written permission for the pupil to take this test, questionnaire, survey, or examination."[85]

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[84] *Rowan v. U.S. Post Office Dept.*, 397 U.S. 728, 736 (1970).
[85] Education Code §51513.

XII
Schools may allow release time programs

A release time program is one where public school students are dismissed from their regular classes, usually for the last hour of school on a Friday afternoon, and receive instruction from someone other than school personnel. These programs can cover broad topics, including religious instruction such as "The Old or New Testament." Instructors can also conduct topical lessons on biblical themes.

In general, public schools may permit the release of students during school hours to attend religious classes taught by religious teachers on private property.[86] However, schools may not allow religious instruction to take place on school grounds during school time.[87]

In California, pupils "may be excused from school in order to participate in religious exercises or to receive moral and religious instruction at their respective places of worship or at other suitable place or places away from school property designated by the religious group, church, or denomination."[88] A school board can adopt a resolution permitting release time for students for up to four days per month.

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[86] *Lanner v. Wimmer*, 662 F.2d 1349 (10th Cir. 1981).
[87] *Id.*
[88] Education Code §46014.

The following criteria have been laid out for the establishment of a "release time" program:

1. Students must have written permission from their parents or guardians to allow them to participate;
2. Regular attendance must be taken and reported to the school;
3. Only one hour a week may be used for religious instruction;
4. The school must not encourage or discourage student participation;
5. No government funds can be used to support the program;
6. The program must take place off school grounds; and
7. The classes cannot be taught by school personnel.[89]

Schools can choose to allow release time classes to satisfy elective credits as long as the policy is neutrally stated and administered.[90] If the school chooses to allow students to receive credit, then they can also require that the courses satisfy specific criteria. Establishing these criteria does not unconstitutionally entangle the state with religion. At the very least a school can count the hour towards attendance for the purposes of receiving their daily attendance funding.[91] Whether or not a school grants credit to students, however, is ultimately entirely within the school board's discretion. To find out about your school

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[89] *Id.*
[90] *Lanner v. Wimmer*, 662 F.2d 1349 (1981).
[91] *Id.*

district, consult the school board's policy on "release time" programs.

XIII
Instructors can make references to religion while teaching

Can the music program still perform the *Hallelujah Chorus*? Must Dante's *Inferno* be banned from the English department? Will the history department be prohibited from showing the civil rights speech, "I Have a Dream," to students because it was delivered by a Baptist minister (Martin Luther King, Jr.) who unapologetically acknowledged his faith in God in the speech?

Many teachers find that proper coverage of certain subject matter requires reference to religion or the actual use of religious materials. Fearing professional discipline or a lawsuit, teachers frequently feel they cannot provide the best instruction for their students because they believe they must eliminate all such references. Indeed, the State academic standards may direct teaching for which religion is at issue.

The truth is that, when an instructor believes that incidental or illustrative reference or other use of religious materials are important for pedagogical reasons, the teacher has a right to act in the best interest of students.

Under Colorado law, references to religious art, literature, music, dance, or other topics having religious significance are legal in the classroom. It should be noted that, while it

has never been the subject of a court case, the Colorado Constitution guarantees free exercise and enjoyment of religious profession and worship.[92]

As long as religious principles are not taught and the instruction is not meant to aid any religious sect, church, creed, or is for a sectarian purpose, teachers are free to make appropriate religious references.

It should also be noted that many teachers have an "academic freedom clause" in their employment contract. As such, it is advisable that this document be reviewed carefully in that it may provide even greater rights than those found in the Education Code. The general rule is that the higher the grade level, the greater the academic freedom of the instructor.

XIV
Conclusion

We would like to thank you for your time and attention to this booklet. If you have any questions, or would like to request additional copies, please contact the Pacific Justice Institute. Moreover, if you would like to inquire about legal advice or assistance with one of the issues discussed in this booklet, contact the legal department of the Pacific Justice Institute for more information.

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[92] Colorado Constitution, Article 2: Bill of Rights, Section 4: Religious Freedom.

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